UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

COFIRE PAVING CORPORATION

and **Case No. 29-CA-27556**

LOCAL 175 UNITED PLANT
& PRODUCTION WORKERS

Linda Harris Crovella, Esq., Counsel for the
General Counsel
Richard B. Ziskin, Esq., Counsel for the
Respondent
Eric Bryon Chaikin Esq., Counsel for the
Charging Party

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on September 19 and 20, 2006. The charge was filed on March 31, 2006 and the Complaint, which issued on June 30, 2006 alleged as follows:

1. That on August 8, 2005, the Union was certified in Case 29-RC-10354 as the bargaining representative in the following unit.

> All full-time and regular part-time asphalt plant workers, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust operators, material yard workers and all other laborers, employed at the Flushing, New York facility.

2. That from July 1, 2002 until at least July 27, 2005, (the date of the election), the Respondent had a collective bargaining agreement with Local 1175, Laborers International Union of North America, AFL-CIO, which was effective from July 1, 2002 through June 30, 2005 and which contained provisions requiring the Respondent to make payments to a Welfare Fund, a Pension Fund and an Annuity Fund. Also, that the agreement contained a provision that entitled certain eligible employees to a three week paid vacation.

3. That since October 4, 2005, the Respondent has terminated payments to the Welfare Fund and has failed and refused to secure or attempt to secure, medical benefits that are substantially equivalent to the benefits they had previously been entitled to under the old contract. It is alleged that in this respect, the Respondent has unilaterally changed the terms and conditions of employment.

4. That since October 4, 2005, the Respondent has unilaterally changed the terms and conditions of employment by failing to secure pension and annuity benefits equivalent to those enjoyed under the old contract.

5. That since March 24, 2006, the Respondent has unilaterally changed terms and conditions of employment by failing to pay accrued vacation days to employees in accordance with the provisions of the aforementioned contract.

6. That on March 24, 2006, the Respondent laid-off all of the unit employees and since that date, has paid them one week of vacation pay instead of the three weeks that they would have accrued under the old contract.

In terms of a remedy, the General Counsel stated in her opening remarks, that the time frame that she was looking at, effectively ends on March 24, 2006 when the asphalt plant was closed. However, with respect to the plant closing and the alleged layoffs that occurred on March 24, 2006, the General Counsel contends that this took place without sufficient notice to or bargaining with the Union and that a Transmarine Remedy should be issued. *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

The Respondent, among other things, contends that:

1. On October 31, 2005, it offered to enroll the affected employees into the Company's health plan. It asserts that this offer was accepted by the Union and the employees. The Respondent claims that the substituted health care benefits were substantially equivalent.

2. That it could not unilaterally continue to make payments to the old union's pension and annuity plans after the Certification and that it could not unilaterally implement any new equivalent plans without bargaining because that would have constituted a bypassing of the certified Union.

3. That the Respondent was entitled to discontinue the pension, annuity and vacation benefits because the parties had reached an impasse. (This argument is not a particularly good one inasmuch as the Company's actions, vis a vis the funds, took place at the outset of negotiations).

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

Findings and Conclusions

I. Jurisdiction

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

Cofire has been engaged in the manufacture and sale of asphalt. It also is engaged as a contractor in the road milling business. In the asphalt aspect of its business, it has a facility in Flushing New York, where it receives by truck, liquid asphalt (tar), sand and gravel, which it then mixes together in a heated silo to make various grades of asphalt. The end product is then sold to enterprises, principally for roads, parking lots, etc. During the last ten years, the asphalt plant operation has employed five to six people who have been represented by a labor union. The milling aspect of the Company's business involves the scraping off of asphalt from existing

roads when they are being redone. This aspect of the Company's business has about 40 employees and has derived about 70% of the Company's revenues.

For many years, the employees of Cofire's asphalt plant have been represented by Local 1175, Material Yard Workers. At some point, that union was placed into trusteeship and it was thereafter merged into Local 731, Building, Concrete, Excavating and Common Laborers, Laborers' International Union of North America, AFL-CIO.

Cofire was party to multi-employer collective bargaining agreements with Local 1175 that ran from July 1, 2002 to June 30, 2005. [1] One of these contracts covered Cofire's yardmen and the other covered one employee who was called a shipper. In any event, the yard contract also covered the employees of other asphalt companies in New York, these being Grace Industries, College Point, and Willet's Point. That agreement, among other things, provided for company payments, on behalf of their respective employees to the Union's Welfare, Pension and Annuity Funds.

At Article V, Section 1(a), the contract sets the hourly wages for each classification, effective on July 1, 2002, July 1, 2003 and July 1, 2004, by designating a portion for wages and a portion for fringes. For example, as of July 1, 2002, for repair- men, the contract states that their hourly wage is $34.11, their fringe benefits are $11.10 and their total wages & fringes are $45.21.

At Article VII, Section 1, the contract provides that the employer shall pay, [to the Union's Welfare Fund], from the first day of employment, beginning as of 7/1/02-6/30/05, $3.77 per hour for all hours worked by each employee up to 50 hours per week.

At Article VII, Section 4, the contract provides that the employer shall pay [to the Union's Pension Fund], from the first day of employment, beginning as of July 1, 2002, $1.43 per hour for all hours worked by each employee up to 40 hours per week.

At Article VII, Section 5, the contract provides that the employer shall pay, [to the Union's Annuity Fund], as of July 1, 2002, $5.70 for all straight time hours worked by each employee, $8.55 per hour for all time and a half hours worked by each employee and $11.40 per hours worked by each employee.

At Article XI, the contract provides that all employees who have been employed for 120 days within the contract year will receive three weeks of vacation with pay.

With respect to the three benefit funds, the testimony was that during negotiations the discussion centered on how much of a total increase should be given by the employers to the workers instead of focusing on wages and each fund contribution as a separate item. The testimony was that when a contract was made, there was, as indicated by Article V, Section 1, agreement that the employers would each increase the total compensation package by x percent per year. After that, the Union discussed internally with its members and with the insurance providers and actuarial consultants, how that total package should be allocated. That is, how much of the total package should be allocated to pay for Health Insurance, how much should go into the Pension fund and how much should be allocated to the Annuity fund. From

[1] The agreement was made with the "members" of the General Contractors Association of New York, Inc."

the employers' perspective, this was of no concern, since their obligation was simply to pay a total amount of money per employee per hour.

With respect to the Welfare Fund, this fund purchased a health insurance policy from Oxford Health Care that provided hospital and medical care through a preferred provider system, with deductibles and co-payments. The Welfare fund also purchased a dental and optical plan to provide these types of benefits for covered employees.

The Pension Plan is a defined benefit plan that provides for retirement payments to employees who reach an eligibility age and who have worked a certain number of years. Employees under this plan could get full or partial pension benefits depending upon when they retired and how many years of credited service they had accumulated. Since this type of plan guarantees a defined benefit, it necessarily utilizes actuarial and investment services in an attempt to ultimately match the money coming in, by way of employer contributions, to what is paid out in the form of pensions.

The Annuity Plan was a defined contribution plan where the payments made by employers on behalf of individual employees would be paid in the form of an annuity to each employee upon retirement, or in certain limited circumstances, before retirement. In some respects, this plan would be similar to, but not identical to a 401(k) plan.

I note that the yardman contract requires the Employer to use six employees and to have minimum defined shifts per week. In 2003, Cofire complained that its asphalt plant operations were less efficient that those of its competitors and it asked the Union for concessions to reduce its labor costs. This is contained in a letter to the trustee of Local 1175 dated August 1, 2003 and, according to the Ross Holland, the Company's president, resulted in an oral agreement, which allowed the Company to rotate the men on a four-day shift basis. He testified that later, in an oral agreement, the Company was allowed to work with five instead of six men when one of the yardmen retired in 2004.

These accommodations were granted by Local 1175 in recognition that Cofire was the least efficient producer among the companies that manufactured asphalt. The Union's witnesses essentially agreed with Holland that Cofire was the least efficient producer, whose labor cost per ton of product was higher than the other companies. One reason for this was that Cofire, unlike the other companies, did not have a facility abutting a waterway and therefore had to have raw materials delivered by truck and not barge. Another reason was that Cofire had older equipment that was not as productive as the equipment used by the other companies. It seems that Cofire did much of its business during the winter months when the other companies chose to close their plants for maintenance and repair during the cold weather. In more recent years, and due to warmer weather, the other companies have kept their plants running later into the winter and this has had an adverse impact on Cofire's niche business.

Local 175, United Plant & Production Workers Union was formed in 2004. Its apparent purpose was to compete with Local 1175 for the affections of the asphalt plant workers of the companies that were party to the multi-employer contract.

On April 20, 2005, Local 175, (the Charging Party), filed a petition for an election in 29-RC-10354. This resulted in a Decision and Direction of Election wherein an election was directed amongst the four asphalt plant workers who were then employed by Cofire. (The shipper was excluded from the unit). At or about the same time, Local 175 filed a petition seeking an election in a multi-employer unit and filed individual petitions for the employees of each Company that was part of the Association. Thereafter, Local 175 withdrew the petition for

a multi-employer bargaining unit and agreed to have separate elections conducted at each company.

On June 30, 2005, the contract with Local 713 covering Cofire's employees expired.

An election was conducted at Cofire on July 27, 2005. Both Local 175 and Local 731 were on the ballot. At the election, Local 175 received a majority of the valid votes counted and it was certified as the bargaining representative on August 8, 2005. [2] The Cofire unit was defined as:

> Included: All full-time and regular part-time asphalt plant workers employed by the Employer at its facility located at 120-30 28th Avenue, Flushing, New York, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust men, barge and boat trimmers, cleaner men, fork lift operators, Hilo operators, material yard workers and all other laborers. [3]
> Excluded: All office clerical employees, guards and supervisors as defined In the Act.

Commencing on July 1, 2005, (*and prior to either the election or the start of bargaining*), the Respondent ceased making payments to the Welfare, Pension and Annuity Funds that were required in the expired contract with Local 1175/731, the losing union. The evidence does not show that the Respondent notified either union of what it was doing before it ceased making these payments.

However, because of Section 8(d) of the Act, the cessation of payments to those funds was in fact, required as of August 8, 2005, (the date of the Certification), because Local 1175/731 was decertified and replaced by Local 175.

After the Respondent ceased making the payments, the monies that it had been paying into the three funds were not distributed to the employees or otherwise used to provide any equivalent annuity or pension benefits. The health insurance benefit is more complicated and will be discussed below. Nevertheless, the affect of the initial failure to make payments to the funds, was that the health insurance coverage, previously provided to the employees would, by the terms of the old plan, terminate as of August 31, 2005. (Apparently, the parties mistakenly believed that the health insurance coverage was scheduled to terminate as of September 31, 2005).

Bargaining between Local 175 and Cofire began in September 2005 and continued intermittently through March 22, 2006. A final bargaining session was held on June 27, 2006. Although initially excluded from the unit by the Board, the parties agreed to include the shipper into the bargaining unit. Therefore, there were five employees in the unit during this time.

Even before the commencement of bargaining, the Union, by letter dated August 30, 2005, sent a proposed "Memorandum of Agreement." This stated in relevant part:

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[2] Elections also were held at the other companies and some have resulted in certifications. For at least two of those companies, Willits Point and College Point Asphalt, Local 175 has been successful in negotiating collective bargaining agreements.

[3] Many of these classifications did not in fact exist at Cofire.

That the terms and conditions of the collective bargaining agreement previously in effect, shall remain in effect pending bargaining and the reaching of a final agreement except as otherwise agreed.

That any new contract would be retroactive to August 6, 2005;

On September 21, 2005, Local 175 presented a revised Memorandum of Understanding. To the extent relevant, it provides:

That the terms and conditions of the Local 1175 contract would remain in effect pending a final agreement.

That any new agreement would be retroactive.

That during the interim period before a final agreement is reached, that the contributions required by the Local 1175 Welfare Fund, Pension Fund and Annuity fund, shall continue but that the contributions would be paid to the United Plant & Production Workers Welfare, Pension and Annuity Funds. [I.e. to the Local 175 funds which the document represents have been duly established and jointly administered by trustees representing the union and employers in the Asphalt industry.]

That the employer accepts and adopts the Agreement and Declaration of Trust creating and governing the 175 Funds as if the Employer were a Party-Signatory thereof, and accepts and adopts the Employer-Trustee named in said Agreement and Declaration of Trust as its designated Trustee. A copy of said Agreement and Declaration of Trust shall be furnished the Employer upon demand. [4]

It is noted that the proposed Memorandum of Understanding, either in its original form or as revised, was intended to be an interim agreement and did not purport to be a final agreement or constitute a waiver by the Company or the Union or their respective rights to bargain for what they each believed would be a suitable collective bargaining agreement. Whether or not this proposed Memorandum of Understanding was a good, bad or mediocre idea, neither side was compelled, as a matter of law, to agree to its terms. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

The Company refused to sign the proffered interim agreement. Ross Holland testified that he didn't think that it was in the Company's interest to sign the Memorandum of Understanding, in part because he didn't think that the payments of $3.77 per hour per employee that had been allotted to the previous health plan would be sufficient to cover the costs of continued coverage for equivalent benefits.

According to Holland, he initially assumed that the employees would be entitled to continue their health insurance from the Local 1175 plan under COBRA and that he intended to pay the COBRA costs for his employees. Holland testified that he nevertheless was notified that continued coverage under COBRA was not permitted by the previous Union's Fund

[4] The proposal to sign an interim agreement and send the money previously sent to the decertified union to the newly created Local 175 funds was a clever way of getting around ERISA and LMRA prohibitions on employers making contributions to a union in the absence of a valid collective bargaining agreement.

administrator. Holland testified that given the fact that the health insurance for his unit employees was about to expire; that they could not continue that coverage under COBRA; and that there was a pending medical emergency facing at least one employee, he called up his insurance broker to investigate what options were available to him other than signing the Memorandum of Understanding with Local 175 and contributing to a plan that he wasn't sure was as yet fully operational. The upshot, according to Holland, was that he decided that given the circumstances, the quickest and most efficacious option was to put the bargaining unit employees into the insurance plan that the Company had purchased from Empire Blue Cross/Blue Shield for its other employees. I will note here that the cost to the Company of placing the employees into the Company's plan was greater than the amount of the contributions that the Company had been making on behalf of the employees to the Local 1175/731 plan. I also note that the company plan, while not providing for dental or optical benefits, does provide for comprehensive family coverage for medical and hospitalization costs.

The first real bargaining session was held on September 22, 2005. [5] Attending for the Union were Richard Tomaszewski and Luciano Falzone. Holland represented the Company. The union representatives noted that the health insurance program that the employees had under the old contract with Local 713 was about to expire. [6] In response, Holland offered to place the bargaining unit employees, at no cost to them, into the Company's medical insurance plan that covered its other employees.

The Union's witnesses testified that at this and some subsequent meetings, Holland stated that he was putting into escrow the moneys that the Company had previously paid on behalf of the employees to the previous Pension, Health and Annuity plans. Holland denies that he made such a promise. In either event, I don't think that any promises made about escrow accounts is really relevant to this case and I view the whole subject as a red herring.

I also note that union representative Falzone testified that at this and almost every other bargaining session, Holland said that it was not economically possible for the Company to continue the terms and conditions of the previous contract with Local 1175. In this regard, Falzone conceded that Cofire's tonnage and productivity capabilities placed it at a economic disadvantage to the other asphalt companies in the New York City area.

On October 31, 2005, Holland wrote a letter to the Union and its counsel, which stated:

> When we met for negotiations on Friday October 21, 2005, one of the issues discussed was health insurance for the employees that you represent. It is my understanding that the Health Insurance coverage to which they were entitled from Local 1175 ceased on September 30, 2005 and they currently do not have any coverage…. I verbally offered to you to enroll the uninsured workers in our office health insurance plan with Empire Health Choice.[7] According to our broker this enrollment can be made retroactive to October 1, 2005, so that there is no lapse in coverage. When the meeting ended I was advised that the offer would be conveyed to the employees and that you would respond to this offer.

[5] A brief meeting was held on September 14, 2005 but this merely was an occasion where the Union's representative, Richard Tomaszewski introduced himself to Holland.

[6] In fact both sides agree that one of the wives of the men had just been was diagnosed with cancer.

[7] This plan does not offer dental or optical benefits.

> As of yet I have not received a response to this offer. Without any solicitation on my part, several employees have come to me and expressed their concern to me about the lack of health insurance as their spouses are facing potentially serious and costly health issues.
>
> For your review… I have enclosed a copy of the summary benefits of the health insurance policy that is currently in place, and if they so elect, the asphalt plant workers can enroll in. Please present this offer to these employees and provide me the response as soon as possible. There is a limited amount of time in which the employees can be enrolled and have the coverage made retroactive to October 1, 2005.

Another meeting was held on November 2, 2005. At this time, Tomaszewski told Holland that the employees thought that the Company's health insurance plan was inferior to what they had previously enjoyed and that they wanted the Company to agree to use the Local 175 plan. When the Company refused to accept this proposal, Tomaszewski stated that the employees would accept the Company's insurance offer under protest. [8]

Soon thereafter, the Company placed the bargaining unit employees into the Company's health insurance plan and started making payments on their behalf to Blue Cross/Blue Shield. Whether or not the company's plan was exactly the same or even substantially equivalent as the previous union's plan with Oxford, the fact is that the costs for the Company were substantially higher than the $3.77 per hour per employee that the previous contract required. [9]

At a negotiation session later in November, 2005, the Company presented a proposal, (in the form of a spreadsheet), that called for substantial union give-backs in wages and benefits. In part, this compared a set of proposed wage and benefits to the wages and benefits that the employees had been receiving under the expired contract. In addition to calling for a reduction in wage rates, Holland's proposal called for the elimination of the Pension and Annuity plans and their substitution with a single defined contribution plan. (A 401(k) plan). He also proposed that the old health care plan be replaced with a new health insurance plan at a cost of $7.50 per hour per employee. Finally, he proposed that the Company's contributions to a newly created defined contribution plan would be increased depending upon the amount of tons of product that were produced. (I.e. based on productivity). This was not accepted by the Union.

On December 28, 2005, Union attorney Chaiken sent a letter to the company requesting another date for bargaining. He also stated:

> Also I would like to point out that Cofire… has been deducting from the worker's wages and retaining in escrow sums of money normally allocated and

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[8] On November 8, 2005, the Company received a letter under what purports to be the Union's letterhead. This stated:

> We the members of Local 175 are accepting the health coverage (temporarily) offered by Cofire Paving Corp., while contract negotiations continue.
>
> At this time, Cofire… is not willing to pay into our funds for the health coverage of our choice. We are accepting the coverage offered… not out of choice, but out of desperation, so our families and ourselves can have health coverage.

[9] The evidence suggests that as of 2005, the old plan was under-funded and that under the new contract that Local 175 made with some of the other asphalt companies, more money than $3.77 per hour would have to be allocated to purchase the plan and its benefits. Also the deductible for that plan was raised from $500 to $1000 and the co-pays were increased.

> paid over to a Union benefit fund pursuant to a collective bargaining agreement. I understand that the parties have not completed negotiations for a contract, but I need to point out that if the Employer insists on retaining the monies it is deducting from the worker's wages for welfare, pension and annuity benefits; then the Employer is holding that money as a Trustee and we consider the funds to be held I the form of a constructive trust. The money is not the Employer's money; it is the worker's money.

On March 7, 2006, Chaiken sent another letter requesting bargaining and asked what was happening to the moneys that the Employer had previously contributed to the three funds.

By a letter in response dated March 9, 2006, Respondent's Counsel stated that the Respondent would resume negotiations on March 22, 2006. He also stated that the Company was "processing the Union's information request."

On March 22, 2006 a bargaining session was held at which Ziskin also appeared with Holland on behalf of the Employer. When asked where the "escrowed" monies were, Ziskin stated that no escrow account had been established.

At the March 22 meeting, the Company presented a full contract proposal which called for substantial give backs. (Indeed, this proposal called for even steeper give-backs than had been demanded in November 2005). This was presented by Holland as what the Company needed to get in order to remain in the asphalt manufacturing business. At one point, Tomaszewski and Falcone called the employees into the meeting and showed them the Company's offer. Although telling them that it was their decision to make and that they should sleep on it, the employees immediately rejected the proposal. Holland told the Union and the employees that this was the best offer he could make and that if it was not accepted he would close. The employees responded that they would rather be out of work than work for $20 per hour less than what they were making. They then left the meeting. But within a few minutes, one of them returned and asked if the plant was closing that night and Holland said that it was not, and that they should report "tomorrow."

Holland testified that after the March 22 meeting, he discussed the situation with his partners and they decided that if the men could not accept the reduced wage and benefit offer, they would close the plant until a future agreement could be reached. Accordingly, on March 24, 2006, Holland gave a letter to each of the employees which stated:

> As you are aware we held a negotiation meeting… on Wednesday, March 22, 2006 at which time we presented a comprehensive offer of wages and benefits. The union called those of you present in to advice you of our offer, which was summarily rejected within fifteen minutes.
>
> Although we are ready willing and able to continue bargaining…, it is not economically feasible for us to continue operating the asphalt plant until such time as we have come to an agreement with respect to wages, benefits and working conditions.
>
> Therefore at the end of business today we will be closing the asphalt plant until everything has come to a resolution. At the end of the workday you will be given your paychecks for the work performed this week as well as information about continuation of health insurance coverage.

Also on March 24, 2006, Holland sent a similar letter to Local 175's attorney. This stated:

> I have held negotiation sessions with representatives of Local 175 on October 21, 2005, November 2, 2005, November 10, 2005 and March 22, 2006.
>
> At the meeting of November 10, 2005 I presented… a summary proposal of wages and benefits for the employees…. I never received a response or counter-offer to this proposal.
>
> On March 22, 2006, I presented … a proposed comprehensive contract with detailed wages, benefits and working conditions. The representatives then called into our meeting those employees in the bargaining unit that were still onsite and provided them with the company's proposal. These employees took the proposal to review, returned within fifteen minutes and summarily rejected the proposal.
>
> We have determined that it is not economically feasible to continue operating the asphalt plant at this time and will be closing the plant at the end of business today. Enclosed is a coy of the letter give to employees in the designated bargaining unit.
>
> Although we are closing the plant for now, we wish to continue negotiating with the Local 175 representatives and hope to come to an agreement. I am available every day next week, other than next Monday, for another negotiating session.
>
> Please relay this request for continued negotiations to your clients.

After being advised that the plant was closed, the employees were given checks encompassing one week's worth of vacation. This was two weeks less than what was required in the expired contract and it appears that the employees, as of this date had accumulated their full entitlement to vacation pay. The topic of vacation pay was not really discussed at the negotiations and there is no dispute that the Company did not notify the Union about its decision to reduce the amount of vacation pay.

On March 27, 2006, the Union requested information supporting the Respondent's claim that it was not economically possible to continue operating the plant. In May, the Company substantially complied with this request and submitted to the Union a variety of documents including financial statements.

In June the parties met for another meeting. In pertinent part, the Union offered to have the employees work under the terms of the expired contract and Holland refused. The Union also made other concessions including a proposal that the Company could operate the plant without using job classifications. This too was rejected and Holland stuck to his last offer.

The five employees involved in this case have not returned to work. But there is a question as to whether they were laid off in conjunction with a permanent closure of the plant or if they were locked out either in response to the Employer's reasonable anticipation of a strike or in support of its bargaining position. The evidence indicates to me that the asphalt plant, which has remained closed, is nevertheless still in place and that it is fully capable of returning to operation if and when a new contract can be reached.

There have been no further meetings after June and neither side has requested any more meetings.

Analysis

In the United States of America, the general rule is that an employer is entitled, (within the constraints of the market), to unilaterally establish prices, wage rates, and employee benefits without the governmental coming in to determine what is proper or appropriate. There are of course a variety of exceptions such as minimum wage laws; statutes that require employers pay for workers compensation insurance; and laws that require minimum safety standards in the work place. And in times of national emergency, the federal government has, on a few occasions, put into effect wage and price controls. This happened during World War II and during a brief period during the Nixon administration when inflation had run rampant during a time of war. But all of these are really exceptions to the general rule.

In the field of labor relations, there are a number of circumstances where an employer is not free to unilaterally establish or change wages and benefits. Obviously, if there is a collective bargaining agreement between an employer and a union, the terms of employment have been established through bargaining and neither side, absent consent by the other, can alter the agreed upon terms of their contract during the life of the contract. See Section 8(d) of the NLRA.

In situations where the employees of a company are not represented by a union but where they are seeking representation, (and where the employer is aware of the organizing activities), an employer may not grant new benefits or withdraw existing benefits as such an action is presumed to be intended to interfere with the employees' free choice in voting. In that circumstance, an employer is required to maintain the status quo. For example, an employer that grants benefits while an election petition is pending will be held to violate Section 8(a)(1) by interfering with the employees rights to select if they want representation unless it meets its burden of proof by showing that the increases either had been planned prior to the Union's advent on the scene or that they were part of some established past practice. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (l963); *Baltimore Catering Co*. 148 NLRB 970 (l964); *Mountaineer Petroleum*, 301 NLRB 801 (1991).

In situations where a union has won a Board conducted election, an employer will be barred from unilaterally changing the status quo in terms of wages and terms and conditions of employment during negotiations until and unless a legitimate impasse is reached. *NLRB v. Katz*, 369 U.S. 736 (1962). In this situation, and unlike the preceding situation where changes made during an election campaign are deemed to constitute 8(a)(1) interference with the employees' Section 7 rights to choose representation, the gravaman of the violation is Section 8(a)(5) in that unilateral changes made while bargaining is in progress is deemed to be bad faith bargaining. The Board has noted however, that it recognizes two limited exceptions to this rule. The first is when economic exigencies compel prompt action and the second is when a union, in the context of an employer's diligent efforts to engage in bargaining, insists on continually avoiding or delaying bargaining. See *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995) and *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd., 15 F.3d 1087 (9th Cir. 1994).

Essentially the same rule applies to a situation where an incumbent union is seeking to renegotiate a contract that is or is about to expire; the theory being that a unilateral change made during contract negotiations constitutes a violation of Section 8(a)(5) of the Act. Thus, an employer will be held to be bargaining in bad faith if, during negotiations, it unilaterally changed the status quo, (represented by the economic terms of the expired or expiring contract).

Therefore, an employer is prohibited from changing the existing terms and conditions of employment unless and until there is a valid impasse, after which the employer may, (assuming that the bargaining has been carried out in good faith), unilaterally implement the terms of its final offer to the extent that it contains only mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1961); *E.I. du Pont de Nemours & Co*., 346 NLRB No. 55; *Gloversville Embossing*, 314 NLRB No. 206.

The theory underlying the concept that certain terms and conditions of employment survive the termination of a collective bargaining agreement does not rest on the idea that the contract itself continues in force and effect. The Board, in this circumstance, has no authority to extend the duration of a contract that has a fixed term. But what it does mean is that during negotiations with a validly recognized incumbent union, an Employer may not, except after a valid impasse and consistent with its last offer, unilaterally change the wage rates or other terms of employment as they exist prior to the start of negotiations. And since the existing wage rates and terms and conditions of employment happen to have been defined by the expired contract, those terms and conditions continue in effect as the status quo. On the other hand, provisions in the expired contract such as a union security clause, a dues checkoff authorization clause or an arbitration clause do not survive the contract's expiration.

In situations where a successor employer purchases the operations of a predecessor that has a collective bargaining agreement with a union, the general rule is that although the new employer may establish the initial terms and conditions of employment, it is required to notify the employees of any intended changes before hire and in the absence of such notification, it is required to maintain the existing terms and conditions as set forth in the predecessor's labor contract until such time as the parties have reached an agreement or have bargained to an impasse. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), *Spruce Up Corp*., 209 NLRB 194, 195 (1974).

The Respondent cites to some language that I used in *Lihli Fashions Corp*., 317 NLRB 163 (1995) and *Bayshore Electrical Supply Co. and Amalgamated Union, Local 355*, 1992 WL 1465459. In the *Bayshore* I made this statement, essentially reiterated in *Lihli Fashions*:

> Pursuant to Section 8(d) of the Act, neither an employer nor a union may, during the life of a collective bargaining agreement, terminate, alter or modify its terms without the consent of the other party. Even after the contract expires, an employer may not unilaterally change the existing terms and conditions of employment as embodied in the expired contract, (insofar as they relate to mandatory subjects of bargaining), without first bargaining in good faith to a new agreement or impasse, unless it lawfully is discharged from its obligation to bargain; for example if the union were to be decertified or replaced by another union under the election procedures established by the Board. *W.A. Krueger Co*., 299 NLRB No. 141; *Roman Iron Works* 292 NLRB 1292, 1293 (1989). [10]

In *Bayshore*, I concluded that because none of these exculpatory conditions existed, the Respondent's decision to terminate, during the course of bargaining, the expired contract's health insurance plan and substitute its own plan, constituted an unlawful refusal to bargain in violation of Section 8(a)(5) of the Act.

[10] I also noted that in *W.A. Krueger Co*., the Board held that even after a union has received a minority of votes in a decertification election, an employer may not make unilateral changes after a contract expired, until the Board issues its Certification of Results.

While I do not wish to retract this quotation, it seems to me that it not applicable to the facts of this case. Here, there was an election with two unions on the ballot that resulted in the decertification of the incumbent union and which therefore relieved the Employer from any further obligation to bargain with *that particular union*. To this extent, the language in *Bayshore* accurately describes the cessation of the Employer's obligation to bargain with the previous incumbent union. But that extends only to the predecessor union and cannot extend to Local 175, which won the election and which became the substituted union, holding a newly created right to bargain.

As described above, in the context of an election campaign, the Employer could not, without violating Section 8(a)(1) of the Act, change, modify or alter the existing terms and conditions of employment before there was a certification. That means that it could not, during the election campaign, withhold or withdraw existing benefits even though the incumbent union's contract had expired on June 30, 2005. It also means that once Local 175 became certified on August 8, 2005, the Employer could not, without violating Section 8(a)(5) of the Act, change, alter or modify the existing mandatory terms and conditions of employment during the course of collective bargaining, until and unless the parties bargained in good faith to an impasse or until Local 175 became decertified as the bargaining representative.

I therefore conclude that the Respondent was obligated to maintain the status quo as it existed as of the Certification date, (August 8, 2005); this being the wage rates and other terms and conditions of employment as represented in the contract that expired on June 30, 2005, to the extent that the Employer was legally bound to comply with those terms.

The next question is what was the legally binding status quo as of the Certification date? To answer that question, we can first state what it was not. First, the union security, dues check-off and arbitration clauses in the expired contract did not survive the expiration date and therefore the Employer had no further obligation to deduct dues from its employees' wages and remit them to Local 1175/973 after June 30. Second, and more significantly, the Employer, by virtue of Section 302 of the LMRA, no longer could make payments of any moneys to any funds jointly administered by Local 1175/973 because that Union, as of August 8, 2005, no longer was the legal bargaining agent.

But that does not end the question.

In my experience in dealing with bargaining cases, the typical mode of bargaining, and the typical labor contract, treats wages and the various other benefits as discrete subjects. That is, the parties negotiate for wage increases, (or decreases) and embody an agreement in contract provisions that either establish a set amount for an increase and/or a schedule of wage rates covering the various employee classifications over a period of time. By the same token, most negotiations and contracts that I have come across, tend to be the result of discrete negotiations covering a variety of subject matters and result in separate provisions for Pension Funds, Health Funds, Annuity Funds and other types of benefits such as vacations and holidays. This does not mean that the negotiating parties are not aware of, or do not take account of the relationship between the various parts of a possible contract and the whole. I would imagine that negotiators for each side come equipped with laptop computers with spread sheet programs so that they each can calculate the cost of the various contract proposals and the economic benefits for the employees.

In relation to wage rates and benefit funds, the history within the New York asphalt Industry has been that the predecessor union negotiated only for wage increases. As I

understand the history of the expired contract, (and previous contracts as well), the respective negotiators dealt only with the amount of a wage increase that would be given to each classification of employee over the lifetime of the contract. There were no employer-union negotiations over the Pension Plan, the Welfare Plan or the Annuity Plan. What happened was that after the parties agreed on new wage rates, the Union went back to its membership and after consulting with them, with actuaries and with health insurance providers, decided how to split up the total wage pie so as to allocate amounts to go to each fund. So for example, if the actuary reported that it would take x amount to guarantee the defined benefit promised by the Pension Fund, then the Union, after discussion with the employees, would allocate x dollars per employee per hour to the Pension Fund. Similarly, if the health insurance provider offered to provide medical benefits at a certain level, the Union, with the employees' assent, would allocate a certain portion of the new contract wage rates for the Heath Plan. The same would be true for the Annuity Fund.

Thus, the evidence shows that as far as the companies were concerned, they simply negotiated for a new wage rate scale and did not negotiate at all on the subjects of Pension, Welfare or Annuity contributions. Whatever negotiations that took place on these latter subjects were internal within the Union and between the Union and potential health insurance companies. Upon agreement within the Union, the Union simply forwarded to the Employers a description of how the pie was to be sliced and the final printed collective bargaining agreement was drawn up to conform to that result.

So, insofar as wage rates and benefit funds, what the Employers agreed to was simply a new wage scale which would be divided up, *at the Union's discretion*. One part was for an hourly take home wage and the three other parts consisted of payments that would be made to the three funds. For example, under the provisions of the expired contract, the hourly wages for repairmen, as of July 1, 2002 was $34.11, their fringe benefits were $11.10 and their total wages & fringes were $45.21. The contract required the Employer to pay to the Union's Welfare Fund, $3.77 per hour for all hours worked by each employee up to 50 hours per week. The contract required the Employer to pay to the Pension Fund $1.43 per hour for all hours worked by each employee up to 40 hours per week. And finally, the contract required the Employer to pay to the Annuity Fund $5.70 for all straight time hours worked by each employee, $8.55 per hour for all time and a half hours worked by each employee and $11.40 per hours worked by each employee.

The point is that the Employers did not agree to provide a Pension Plan or a Welfare Plan or an Annuity Plan. The bargain was that the Employers would pay a total amount of money per employee per hour and the Union would do the rest. It was to be the Union that would decide, with the employees, how to allocate the total amount of money and allocate it for different purposes.

There is no doubt in my mind that the Employer was obligated under the NLRA, to continue making those payments that it would have otherwise made to the Pension and Annuity funds as those amounts of money constituted a portion of the wage scale that the employees enjoyed as of the date that Local 175 was certified. Therefore, it is my opinion that the Respondent could not unilaterally reduce the employees' wages upon the replacement of the old union with the newly certified union, unless and until an impasse was reached in bargaining or until the new union was decertified.

While it is true that the Respondent was prohibited from making payments to the old union's Pension and Annuity funds and had no obligation to agree to make payments to the

Local 175's newly created funds in the absence of an agreement to do so, it is my opinion that the money could and should have gone directly to the employees.

I also conclude that when the employees were no longer employed as of March 24, 2006, they had, under the pre-existing terms and conditions of employment, accrued three weeks of vacation pay. Accordingly, as this issue was not even discussed during negotiations, I conclude that the Respondent owes two weeks of vacation pay to the bargaining unit employees.

The Health Plan is a different story.

Until the certification date, the Company was obligated to contribute $3.77 per hour per employee to a fund pursuant to which the decertified Union purchased a health insurance plan from Oxford.

While it might have been expedient, or even a good idea for the Company to have agreed, on an interim basis, with Local 175's idea of making the same contributions to a newly created plan established by Local 175 for health insurance purposes, the Respondent simply had no legal obligations to do so. It legitimately could refuse to make such an interim agreement and perhaps did so because it felt that this would reduce its leverage in bargaining for a final contract.

Since the Respondent could not continue to make contributions to Local 1175's health plan and did not have any legal obligation to make equivalent contributions to Local 175's plan, it had two other options. The first option was simply to make the $3.77 per hour payments directly to each employee as part of their regular take home pay. The second option was to provide an alternative health insurance plan that would provide more or less equivalent benefits.

In the present case, the Company explored the option of providing an alternative health insurance plan, in part because one of its employees had a spouse who was diagnosed with cancer and whose treatment could not be covered under the old Union's plan because the employees could not retain their insurance under COBRA. Further, the option of simply making the payments in cash to the employees would have put the employee with the medical issue into the untenable position of trying to get family health insurance, on an individual basis, and with a pre-existing medical condition.

Given the circumstances as they existed as of September and October of 2005, it is my opinion that what the Company did was reasonable and appropriate. It may be that putting the employees into its own BlueCross/Blue Shield plan was not exactly the same, in terms of covered medical services, as what the employees had enjoyed under the previous Oxford plan. But there is no question that the Company's plan, except for dental and optical benefits, provided the employees with comprehensive family medical and hospitalization insurance. Moreover, the cost to the Company was higher than what it had agreed to pay under the old contract to provide medical insurance to its employees with the decertified Union.

I therefore conclude that the Respondent did not violate Section 8(a)(5) of the Act, when in these particular circumstances, it ceased making payments to a union sponsored health insurance plan and instead obtained an alternative medical plan for its employees at company expense.

As noted at the beginning of this Decision, the General Counsel, in her opening statement asserted that the Respondent failed to bargain about the closing of the asphalt facility on March 24, 2006 and the concomitant layoff of the bargaining unit employees.

In my opinion, this assertion is not alleged in the Complaint and is therefore outside the scope of this litigation. But even if it was encompassed by the Complaint, I don't think that the evidence would support the conclusion that the General Counsel would like me to make.

There is no dispute that by March 22, 2006, the parties had been negotiating for quite some time, even if it was in fits and starts. There is no question but that the Company, based on its competitive disadvantage to the other asphalt plants in New York City, was seeking to reduce its labor costs and had offered a contract that would have required the five employees in this aspect of the Company's operations, to make major concessions. The evidence shows that when the Company made a contract offer on March 22, the employees unanimously rejected it.

On March 24, 2006, the Company notified the employees and the Union that it was discontinuing operations of the asphalt plant. In the letter to the employees, it stated inter alia:

> Although we are ready willing and able to continue bargaining…, it is not economically feasible for us to continue operating the asphalt plant until such time as we have come to an agreement with respect to wages, benefits and working conditions.
>
> Therefore at the end of business today we will be closing the asphalt plant until everything has come to a resolution….

In the letter sent to the Union, enclosing a copy of the letter to the employees, the Company wrote inter alia;

> We have determined that it is not economically feasible to continue operating the asphalt plant at this time and will be closing the plant at the end of business today. Enclosed is a copy of the letter give to employees in the designated bargaining unit.
>
> Although we are closing the plant for now, we wish to continue negotiating with the Local 175 representatives and hope to come to an agreement. I am available every day next week, other than next Monday, for another negotiating session.

In essence, what we have here is not a plant closing but rather what can reasonably be described as a lockout. And as a lockout, equivalent to a strike, is part and parcel of the bargaining process, (used by one side to pressure the other to accede to its demands), there is no additional legal obligation to bargain before an Employer engages in a lockout. (Such a conclusion would require an employer to first give notice and bargain before engaging in a lockout).

Conclusions of Law

1. The Respondent, Cofire Paving Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 175, United Plant & Production Workers is a labor organization within the meaning of Section 2(5) of the Act.

3. That on August 8, 2005, the Union was certified in Case 20-RC-10354 as the bargaining representative in the following unit.

> All full-time and regular part-time asphalt plant workers, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust operators, material yard workers and all other laborers, employed at the Flushing, New York facility.

4. That the Respondent has violated Section 8(a)(1) & (5) of the Act by unilaterally changing the terms and conditions of employment for its employees by failing to pay them, as part of their existing wages, the amounts of money that it had previously paid to a pension and an annuity plan.

5. That the Respondent has violated Section 8(a)(1) & (5) of the Act by unilaterally failing to pay its employees two weeks of vacation pay that they had accrued under their pre-existing conditions of employment.

6. That the Respondent has not violated the Act in any other manner alleged or encompassed by the Complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Concluding that the Respondent was obligated, except to the extent necessitated by emergency, to maintain the existing terms and conditions of employment after Local 175 was certified by the Board, I have determined that it was required to continue to make payments to the employees that were the equivalent of the amounts that it had previously paid on their behalf to the Pension and Annuity plans that had existed prior to the certification date. As its bargaining obligation to Local 175 commenced on August 8, 2005, I conclude that this is when the backpay period should commence. On the other hand, the General Counsel concedes that the backpay period should end on March 24, 2006, when the Employer, at least on a temporary basis, ceased operating the asphalt plant. Any amount owed, should be paid with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: [11]

ORDER

The Respondent, Cofire Paving Corporation, its officers, agents, successor, and assigns, shall

1. Cease and Desist from

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[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a. Failing to bargain in good faith with Local 175, United Plant & Production Workers, by failing to give notice to and offering to bargain with it before unilaterally failing to pay its employees, as part of their existing wages, the amounts of money that it had previously paid to a Pension and an Annuity plan on their behalf.

b. Failing to bargain in good faith with Local 175, United Plant & Production Workers, by failing to give notice to and offering to bargain with it before unilaterally failing to pay its employees the amount of money that they had accrued as paid vacation leave.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Local 175 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time asphalt plant workers, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust operators, material yard workers and all other laborers, employed at the Flushing, New York facility.

(b) Make whole, with interest, the employees for the loss of earnings they suffered as a result of the unilateral changes to the vacation, pension and annuity policies, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Flushing, New York, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current

[12] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employees and former employees employed by the Respondents at any time since October 4, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. , December 5, 2006.

_____
Raymond P. Green
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Local 175, United Plant & Production Workers by unilaterally changing, without notice and an opportunity to bargain, the employees' existing terms and conditions of employment such as vacation leave and payments for pension and annuity benefits.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL on request, bargain with Local 175 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time asphalt plant workers, including mixer men, repair men, grease men, welders, conveyor men, belt men, dust operators, material yard workers and all other laborers, employed at the Flushing, New York facility.

WE WILL make our employees whole for the failure to continue to pay them their rates of pay and other benefits that were in effect when Local 175 was certified by the Board as their exclusive collective bargaining agent.

COFIRE PAVING CORPORATION

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center, Jay Street and Myrtle Avenue
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.